

16.8 Consultation requirements.

(a) *Requirement to consult.* (1) Before it files any application for a new license, a nonpower license, an exemption from licensing, or, pursuant to §16.25 or §16.26 of this part, a surrender of a project, a potential applicant must consult with the relevant Federal, State, and interstate resource agencies, including the National Marine Fisheries Service, the United States Fish and Wildlife Service, the National Park Service, the United States Environmental Protection Agency, the Federal agency administering any United States lands or facilities utilized or occupied by the project, the appropriate state fish and wildlife agencies, the appropriate State water resource management agencies, the certifying agency under section 401(a)(1) of the Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. 1341(c)(1), and any Indian tribe that may be affected by the project.

(2) Each requirement in this section to contact or consult with resource agencies or Indian tribes shall require as well that the potential Applicant contact or consult with members of the public.

(3) If the potential applicant for a new or subsequent license commences first stages pre-filing consultation under this part on or after July 23, 2005, it must file a notification of intent to file a license application pursuant to §5.5 of this chapter and a pre-application document pursuant to the provisions of §5.6 of this chapter.

(4) The Director of the Office of Energy Projects will, upon request, provide a list of known appropriate Federal, state, and interstate resource agencies, and Indian tribes, and local, regional, or national non-governmental organizations likely to be interested in any license application proceeding.

(5)(i) Before it files an amendment that would be considered as material under §4.35 of this part, to any application subject to this section, an applicant must consult with the resource agencies and Indian tribes listed in paragraph (a)(1) of this section and allow such agencies and tribes at least 60 days to comment on a draft of the proposed amendment and to submit recommendations and conditions to the applicant. The amendment as filed with the Commission must summarize the consultation with the resource agencies and Indian tribes on the proposed amendment and respond to any obligations, recommendations or conditions submitted by the agencies or Indian tribes.

(ii) If an applicant has any doubt as to whether a particular amendment would be subject to the pre-filing consultation requirements of this section, the applicant may file a written request for clarification with the Director, Office of Energy Projects.

(b) *First stage of consultation.* (1) A potential Applicant for a new or subsequent license must, at the time it files its notification of intent to seek a license pursuant to §5.5 of this chapter, provide a copy of the pre-application document required by §5.6 of this chapter to the entities specified in §5.6(a) of this chapter.

(2) A potential applicant for a nonpower license or exemption or a potential applicant which elects to use the licensing procedures of Parts 4 or 16 of this chapter prior to July 23, 2005, must promptly contact each of the appropriate resource agencies, Indian tribes, and members of the public listed in paragraph (a)(1) of this section, and the Commission with the following information:

(i) Detailed maps showing existing project boundaries, if any, proper land descriptions of the entire project area by township, range, and section, as well as by state, county, river, river mile, and closest town, and also showing the specific location of all existing and proposed project facilities, including roads, transmission lines, and any other appurtenant facilities;

(ii) A general engineering design of the existing project and any proposed changes, with a description of any existing or proposed diversion of a stream through a canal or penstock;

(iii) A summary of the existing operational mode of the project and any proposed changes;

(iv) Identification of the environment affected or to be affected, the significant resources present and the applicant's existing and proposed environmental protection, mitigation, and enhancement plans, to the extent known at that time;

(v) Streamflow and water regime information, including drainage area, natural flow periodicity, monthly flow rates and durations, mean flow figures illustrating the mean daily streamflow curve for each month of the year at the point of diversion or impoundment, with location of the stream gauging station, the method used to generate the streamflow data provided, and copies of all records used to derive the flow data used in the applicant's engineering calculations;

(vi) Detailed descriptions of any proposed studies and the proposed methodologies to be employed; and

(vii) Any statement required by §4.301(a) of this chapter.

(3)(i) A potential applicant for an exemption, a new or subsequent license for which the deadline for filing a notification of intent to seek a license is prior to July 23, 2005 and which elects to commence pre-filing consultation under this part, or a new or subsequent license for which the deadline for filing a notification of intent to seek a license is on or after July 23, 2005 and which receives Commission approval to use the license application procedures of this part must:

(A) Hold a joint meeting, including an opportunity for a site visit, with all pertinent agencies, Indian tribes and members of the public to review the information and to discuss the data and studies to be provided by the potential applicant as part of the consultation process; and

(B) Consult with the resource agencies, Indian tribes and members of the public on the scheduling of the joint meeting; and provide each resource agency, Indian tribe, member of the public, and the Commission with written notice of the time and place of the joint meeting and a written agenda of the issues to be discussed at the meeting at least 15 days in advance.

(ii) The joint meeting must be held no earlier than 30 days, and no later than 60 days from, as applicable:

(A) The date of the potential applicant's letter transmitting the information required by paragraph (b)(2) of this section, in the case of a potential exemption applicant or a potential license applicant that commences pre-filing consultation under this part prior to July 23, 2005; or

(B) The date of the Commission's approval of the potential license applicant's request to use the license application procedures of this part pursuant to the provisions of part 5, in the case of a potential license applicant for which the deadline for filing a notification of intent to seek a license is on or after July 23, 2005.

(4) Members of the public are invited to attend the joint meeting held pursuant to paragraph (b)(3) of this section. Members of the public attending the meeting are entitled to participate fully in the meeting and to express their views regarding resource issues that should be addressed in any application for a new license that may be filed by the potential applicant. Attendance of the public at any site visit held pursuant to paragraph (b)(3) of this section shall be at the discretion of the potential applicant. The potential applicant must make either audio recordings or written transcripts of the joint meeting, and must upon request promptly provide copies of these recordings or transcripts to the Commission and any resource agency and Indian tribe.

(5) Unless otherwise extended by the Director of Office of Energy Projects pursuant to paragraph (b)(6) of this section, not later than 60 days after the joint meeting held under paragraph (b)(3) of this section each interested resource agency, and Indian tribe, and member of the public must provide a potential applicant with written comments:

(i) Identifying its determination of necessary studies to be performed or information to be provided by the potential applicant;

(ii) Identifying the basis for its determination;

(iii) Discussing its understanding of the resource issues and its goals objectives for these resources;

(iv) Explaining why each study methodology recommended by it is more appropriate than any other available methodology alternatives, including those identified by the potential applicant pursuant to paragraph (b)(2)(vi) of this section;

(v) Documenting that the use of each study methodology recommended by it is a generally accepted practice; and

(vi) Explaining how the studies and information requested will be useful to the agency, Indian tribe, or member of the public in furthering its resource goals and objectives.

(6)(i) If a potential applicant and a resource agency, Indian tribe, or member of the public disagree as to any matter arising during the first stage of consultation or as to the need to conduct a study or gather information referenced in paragraph (c)(2) of this section, the potential applicant or resource agency, or Indian tribe, or member of the public may refer the dispute in writing to the Director of the Office of Energy Projects (Director) for resolution.

(ii) The entity referring the dispute must serve a copy of its written request for resolution on the disagreeing party at the time the request is submitted to the Director. The disagreeing party may submit to the Director a written response to the referral within 15 days of the referral's submittal to the Director.

(iii) Written referrals to the Director and written responses thereto pursuant to paragraphs (b)(6)(i) or (b)(6)(ii) of this section must be filed with the Secretary of the Commission in accordance with the Commission's Rules of Practice and Procedure, and must indicate that they are for the attention of the Director of the Office of Energy Projects pursuant to §16.8(b)(6).

(iv) The Director will resolve disputes by an order directing the potential applicant to gather such information or conduct such study or studies as, in the Director's view, is reasonable and necessary.

(v) If a resource agency, Indian tribe, or member of the public fails to refer a dispute regarding a request for a potential applicant to obtain information or conduct studies (other than a dispute regarding the information specified in paragraph (b)(1) or (b)(2) of this section, as applicable), the Commission will not entertain the dispute following the filing of the license application.

(vi) If a potential applicant fails to obtain information or conduct a study as required by the Director pursuant to paragraph (b)(6)(iv) of this section, its application will be considered deficient.

(7) Unless otherwise extended by the Director pursuant to paragraph (b)(6) of this section, the first stage of consultation ends when all participating agencies, Indian tribes, and members of the public provide the written comments required under paragraph (b)(5) of this section or 60 days after the joint meeting held under paragraph (b)(3) of this section, whichever occurs first.

(c) *Second stage of consultation.* (1) Unless determined otherwise by the Director of the Office of Energy Projects pursuant to paragraph (b)(6) of this section, a potential applicant must complete all reasonable and necessary studies and obtain all reasonable and necessary information requested by resource agencies and Indian tribes under paragraph (b):

(i) Prior to filing the application, if the results:

(A) Would influence the financial (e.g., instream flow study) or technical feasibility of the project (e.g., study of potential mass soil movement); or

(B) Are needed to determine the design or location of project features, reasonable alternatives to the project, the impact of the project on important natural or cultural resources (e.g., resource surveys), suitable mitigation or enhancement measures, or to minimize impact on significant resources (e.g., wild and scenic river, anadromous fish, endangered species, caribou migration routes);

(ii) After filing the application but before license issuance, if the applicant complied with the provisions of paragraph (b)(1) or (b)(2) of this section, as applicable, no later than four years prior to the expiration date of the existing license and the results:

(A) Would be those described in paragraphs (c)(1)(i) (A) or (B) of this section; and

(B) Would take longer to conduct and evaluate than the time between the conclusion of the first stage of consultation and the new license application filing deadline.

(iii) After a new license is issued, if the studies can be conducted or the information obtained only after construction or operation of proposed facilities, would determine the success of protection, mitigation, or enhancement measures (e.g., post-construction monitoring studies), or would be used to refine project operation or modify project facilities.

(2) If, after the end of the first stage of consultation as defined in paragraph (b)(7) of this section, a resource agency, Indian tribe, or member of the public requests that the potential applicant conduct a study or gather information not previously identified and specifies the basis for its request, under paragraphs (b)(5)(i)–(vi) of this section, the potential applicant will promptly initiate the study or gather the information, unless the Director of the Office of Energy Projects determines under paragraph (b)(5) of this section either that the study or information is unreasonable or unnecessary or that use of the methodology requested by a resource agency or Indian tribe for conducting the study is not a generally accepted practice.

(3) (i) The results of studies and information gathering referenced in paragraphs (c)(1)(ii) and (c)(2) of this section will be treated as additional information; and

(ii) Filing and acceptance of an application will not be delayed and an application will not be considered deficient or patently deficient pursuant to §4.32 (e)(1) or (e)(2) of this chapter merely because the study or information gathering is not complete before the application is filed.

(4) A potential applicant must provide each resource agency and Indian tribe with:

(i) A copy of its draft application that:

(A) Indicates the type of application the potential applicant expects to file with the Commission; and

(B) Responds to any comments and recommendations made by any resource agency or Indian tribe either during the first stage of consultation or under paragraph (c)(2) of this section;

(ii) The results of all studies and information gathering either requested by that resource agency or Indian tribe in the first stage of consultation (or under paragraph (c)(2) of this section if available) or which pertains to resources of interest to that resource agency or Indian tribe and which were identified by the potential applicant pursuant to paragraph (b)(2)(vi) of this section, including a discussion of the results and any proposed protection, mitigation, or enhancement measure; and

(iii) A written request for review and comment.

(5) A resource agency or Indian tribe will have 90 days from the date of the potential applicant's letter transmitting the paragraph (c)(4) of this section information to it to provide written comments on the information submitted by a potential applicant under paragraph (c)(4) of this section.

(6) If the written comments provided under paragraph (c)(5) of this section indicate that a resource agency or Indian tribe has a substantive disagreement with a potential applicant's conclusions regarding resource impacts or its proposed protection, mitigation, or enhancement measures, the potential applicant will:

(i) Hold at least one joint meeting with the disagreeing resource agency or Indian tribe and other agencies with similar or related areas of interest, expertise, or responsibility not later than 60 days from the date of the disagreeing agency's or Indian tribe's written comments to discuss and to attempt to reach agreement on its plan for environmental protection, mitigation, or enhancement measures; and

(ii) Consult with the disagreeing agency or Indian tribe and other agencies with similar or related areas of interest, expertise, or responsibility on the scheduling of the joint meeting and provide the disagreeing resource agency or Indian tribe, other agencies with similar or related areas of interest, expertise, or responsibility, and the Commission with written notice of the time and place of each meeting and a written agenda of the issues to be discussed at the meeting at least 15 days in advance.

(7) The potential applicant and any disagreeing resource agency or Indian tribe may conclude a joint meeting with a document embodying any agreement among them regarding environmental protection, mitigation, or enhancement measures and any issues that are unresolved.

(8) The potential applicant must describe all disagreements with a resource agency or Indian tribe on technical or environmental protection, mitigation, or enhancement measures in its application, including an explanation of the basis for the applicant's disagreement with the resource agency or Indian tribe, and must include in its application any document developed pursuant to paragraph (c)(7) of this section.

(9) A potential applicant may file an application with the Commission if:

(i) It has complied with paragraph (c)(4) of this section and no resource agency or Indian tribe has responded with substantive disagreements by the deadline specified in paragraph (c)(5) of this section; or

(ii) It has complied with paragraph (c)(6) of this section if any resource agency or Indian tribe has responded with substantive disagreements.

(10) The second stage of consultation ends:

(i) Ninety days after the submittal of information pursuant to paragraph (c)(4) of this section in cases where no resource agency or Indian tribe has responded with substantive disagreements; or

(ii) At the conclusion of the last joint meeting held pursuant to paragraph (c)(6) of this section in cases where a resource agency or Indian tribe has responded with substantive disagreements.

(d) *Third stage of consultation.* (1) The third stage of consultation is initiated by the filing of an application for a new license, nonpower license, exemption from licensing, or surrender of license, accompanied by a transmittal letter certifying that at the same time copies of the application are being distributed to the resource agencies, Indian tribes, and other government offices specified in paragraph (d)(2) of this section and §16.10(f) of this part, if applicable.

(2) As soon as an applicant files such application documents with the Commission, or promptly after receipt in the case of documents described in paragraph (d)(2)(iii) of this section, as the Commission may direct, the applicant must serve on every resource agency and Indian tribe consulted, on other government offices, and, in the case of applications for surrender or nonpower license, any state, municipal, interstate, or Federal agency which is authorized to assume regulatory supervision over the land, waterways, and facilities covered by the application for surrender or nonpower license, copies of:

(i) Its application for a new license, a nonpower license, an exemption from licensing, or a surrender of the project;

(ii) Any deficiency correction, revision, supplement, response to additional information request, or amendment to the application; and

(iii) Any written correspondence from the Commission requesting the correction of deficiencies or the submittal of additional information.

(e) *Resource agency or Indian tribe waiver of compliance with consultation requirement.* (1) If a resource agency or Indian tribe waives in writing compliance with any requirement of this section, a potential applicant does not have to comply with that requirement as to that agency or Indian tribe.

(2) If a resource agency or Indian tribe fails to timely comply with a provision regarding a requirement of this section, a potential applicant may proceed to the next sequential requirement of this section without waiting for the resource agency or Indian tribe to comply.

(3) The failure of a resource agency or Indian tribe to timely comply with a provision regarding a requirement of this section does not preclude its participation in subsequent stages of the consultation process.

(4) Following July 23, 2003 a potential license applicant engaged in pre-filing consultation under this part may during first stage consultation request to incorporate into pre-filing consultation any element of the integrated license application process provided for in part 5 of this chapter. Any such request must be accompanied by a:

(i) Specific description of how the element of the part 5 license application would fit into the pre-filing consultation process under this part; and

(ii) Demonstration that the potential license applicant has made every reasonable effort to contact all resource agencies, Indian tribes, non-governmental organizations, and others affected by the potential applicant's proposal, and that a consensus exists in favor of incorporating the specific element of the part 5 process into the pre-filing consultation under this part.

(f) *Application requirements documenting consultation and any disagreements with resource agencies or Indian tribes.* An applicant must show in Exhibit E of its application that it has met the requirements of paragraphs (b) through (d) of this section, and §16.8(i), and must include:

(1) Any resource agency's or Indian tribe's letters containing comments, recommendations, and proposed terms and conditions;

(2) Any letters from the public containing comments and recommendations;

(3) Notice of any remaining disagreement with a resource agency or Indian tribe on:

(i) The need for a study or the manner in which a study should be conducted and the applicant's reasons for disagreement, and

(ii) Information on any environmental protection, mitigation, or enhancement measure, including the basis for the applicant's disagreement with the resource agency or Indian tribe.

(4) Evidence of any waivers under paragraph (e) of this section;

(5) Evidence of all attempts to consult with a resource agency or Indian tribe, copies of related documents showing the attempts, and documents showing the conclusion of the second stage of consultation;

(6) An explanation of how and why the project would, would not, or should not, comply with any relevant comprehensive plan as defined in §2.19 of this chapter and a description of any relevant resource agency or Indian tribe determination regarding the consistency of the project with any such comprehensive plan;

(7) A description of how the applicant's proposal addresses the significant resource issues raised by members of the public during the joint meeting held pursuant to paragraph (b)(2) of this section.

(g) *Requests for privileged treatment of pre-filing submission.* If a potential applicant requests privileged treatment of any information submitted to the Commission during pre-filing consultation (except for the information specified in paragraph (b)(1) of this section), the Commission will treat the request in accordance with the provisions in §388.112 of this chapter until the date the application is filed with the Commission.

(h) *Other meetings.* Prior to holding a meeting with a resource agency or Indian tribe, other than a joint meeting pursuant to paragraph (b)(3)(i) or (c)(6)(i) of this section, a potential applicant must provide the Commission and each resource agency or Indian tribe (with an area of interest, expertise, or responsibility similar or related to that of the resource agency or Indian tribe with which the potential applicant is to meet) with written notice of the time and place of each meeting and a written agenda of the issues to be discussed at the meeting at least 15 days in advance.

(i) *Public participation.* (1) At least 14 days in advance of the joint meeting held pursuant to paragraph (b)(3), the potential applicant must publish notice, at least once, of the purpose, location, and timing of the joint meeting, in a daily or weekly newspaper published in the county or counties in which the existing project or any part thereof or the lands affected thereby are situated. The notice shall include a copy of the written agenda of the issues to be discussed at the joint meeting prepared pursuant to paragraph (b)(3)(ii) of this section.

(2)(i) A potential applicant must make available to the public for inspection and reproduction the information specified in paragraph (b)(1) of this section from the date on which the notice required by paragraph (i)(1) of this section is first published until a final order is issued on the license application.

(ii) The provisions of §16.7(e) shall govern the form and manner in which the information is to be made available for public inspection and reproduction.

(iii) A potential applicant must make available to the public for inspection at the joint meeting required by paragraph (b)(3) of this section the information specified in paragraph (b)(2) of this section.

(j) *Critical Energy Infrastructure Information*. If this section requires an applicant to reveal Critical Energy Infrastructure Information (CEII), as defined by §388.113(c) of this chapter, to any person, the applicant shall follow the procedures set out in §16.7(d)(7).

[Order 513, 54 FR 23806, June 2, 1989, as amended by Order 513–A, 55 FR 16, Jan. 2, 1990; Order 533, 56 FR 23154, May 20, 1991; 56 FR 61156, Dec. 2, 1991; Order 2002, 68 FR 51140, Aug. 25, 2003; Order 643, 68 FR 52095, Sept. 2, 2003; 68 FR 61743, Oct. 30, 2003]

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